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In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

vs.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE 118 CALIFORNIA CITIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must cities have specific evidence of the harmful secondary effects of a particular type of adult business or combination of adult businesses, before cities may enact regulations to address the harmful impacts of that particular type of business or combination of adult businesses?

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INTEREST OF AMICI CURIAE

The 118 California Cities listed in the attached Appendix (hereinafter "California Cities") have a vital interest in the regulation of adult businesses to prevent the harmful secondary effects caused by such establishments on their residential neighborhoods, commercial businesses and industries. The decision in *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000) ("*Alameda Books*"), threatens the California Cities' ability to adopt and enforce their regulations because it requires that cities document and produce particularized evidence to support each aspect of a multi-faceted regulatory program. Moreover, the *Alameda Books* decision establishes an evidentiary standard for adult business regulation that is unreasonably stringent, prohibitively expensive to implement, and contrary to this Court's prior pronouncements on this issue. The level of scrutiny applied in *Alameda Books* by the Ninth Circuit will significantly alter the current balance between opportunities for adult expression and municipal efforts to ameliorate inevitable harmful secondary effects.

In sum, amici California Cities have a strong interest in and are directly affected by the decision below. They respectfully submit this Amicus Brief in Support of the City of Los Angeles' Petition for Writ of Certiorari.[1]

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[1] This Petition of Amici Curiae in Support of this Petition is timely filed pursuant to Rule 37.2 of the Rules of this Court. Pursuant to Rule 37.4 of the Rules of this Court, this Petition is presented on behalf of the 118 California Cities listed in the attached Appendix and has been authorized by the law officer of each city.

STATEMENT OF THE CASE

In *Alameda Books, Inc. v. City of Los Angeles*, the Ninth Circuit Court of Appeal, in an opinion by Judge Hawkins, struck down a reasonable attempt by the City of Los Angeles ("City") to address what the City believed to be deleterious impacts of locating two adult businesses in the same building. *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000). The Ninth Circuit found that this "multi-use" prohibition was invalid because the City did not establish a substantial interest in its enactment.[2] Adoption of the multi-use prohibition was based on the City's own 1977 study (the "1977 Study") documenting the fact that the concentration of adult entertainment businesses results in increased crime, decreased property values, and generally causes blight and other negative impacts in the neighborhoods in which they are concentrated. The 1977 Study found that fully one-fourth of the adult businesses that experienced

[2] As described in the City of Los Angeles' Petition for Writ of Certiorari, the "multi-use" prohibition provides as follows: ANo person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business or within 500 feet of any religious institution, school or public park within the City of Los Angeles. No person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult business." See Brief of Petitioner at 7.

the greatest increases in crime were adult bookstores and arcades.[3]

At the time the City Council adopted the multi-use prohibition, the City Council was aware of the decision in *Hart Bookstores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) (*Hart*) where the court relied on the City of Los Angeles' 1977 Study to

[3] The 1977 Study upon which the City relied incorporated a crime report for the Hollywood area compiled by the Los Angeles Police Department entitled, "The Impact of Sex Oriented Businesses on the Police Problem in the City of Los Angeles." [Tab 7, pp. 575-576; 658.] (Citations are to Appellant's Excerpt of Record, filed with the Ninth Circuit Court of Appeals.) The Crime Report compared the crime rate for the Hollywood area to the crime rate citywide between 1969 and 1975, during which adult businesses had the greatest proliferation in the Hollywood area. [Tab 7, pp. 665-667.] The Study noted that one-fourth (24 of 99) of the adult entertainment businesses existing in the Police Department West Bureau, including Hollywood, in 1976, were classified as "Bookstores/ Arcades." [Tab 6, p. 422.] The Crime Report determined that there was an overwhelming increase in crime for the Hollywood area as compared to citywide and at the same time deployment of police personnel in the Hollywood area proportionately increased. The Crime Report noted that:

> "The overwhelming increase in prostitution, robberies, assaults, thefts, and the proportionate growth in police personnel deployed throughout Hollywood, are all representative of the blighting results that the clustering of Adult Entertainment Establishments has on the entire community. These adverse social effects not only infect the environs immediately adjacent to the parlors but create a malignant atmosphere in which crime spreads to epidemic proportions." [Tab. 7, p. 667.]

uphold a multi-use prohibition very similar to the one enacted by the City of Los Angeles. *Hart* at 823.

After the multi-use prohibition was enacted, plaintiffs expanded their adult bookstores to include adult video arcades. When the City sought to enforce the multi-use prohibition, the plaintiffs filed suit in federal court seeking declaratory and injunctive relief to have the multi-use prohibition declared unconstitutional and its enforcement enjoined. The trial court granted plaintiffs' motion for summary judgment and held that the multi-use prohibition prohibiting an adult bookstore and adult video arcade in one building violated the First Amendment.

The Ninth Circuit affirmed, finding that the multi-use prohibition did not serve a "substantial governmental interest." *Alameda Books* at 724. In the court's view, Los Angeles did not have, in the pre-enactment legislative record, specific evidence to prove that the specific combination of bookstores and video arcades would produce harmful secondary effects:

> " . . . [The] Study was not directed at determining the impact of individual adult entertainment business units. Rather, its purpose was to ascertain the impact of a concentration of such business units in small geographic areas. Therefore, by categorizing certain businesses as 'bookstore/arcades', the Study determined not what the impact of a 'bookstore/arcade' was on the surrounding area, but the impact of a 'bookstore/arcade' as an individual business entity that was part of a concentration consisting of multiple adult business establishments. *As such, the Study did not identify any harmful secondary*

> *effects resulting from a 'bookstore/ arcade' combination as individual business units."* (Emphasis added.) *Alameda Books* at 724.
>
> *" . . . Los Angeles has presented no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects identified in the [1977] study.* As the above discussion indicates, the evidence the city has 'relied' upon – the 1977 Study – contains no findings that an individual combination bookstore/arcade produces any of the increased crime the study found resulting from a concentration of adult businesses. Therefore, it is unreasonable for the City to infer that absent its regulations, a bookstore/arcade combination would have harmful secondary effects." (Emphasis added.) *Id.* at 725.

On November 17, 2000, Petitioner, City of Los Angeles, filed its Petition for Writ of Certiorari with this Court.

ARGUMENT

The California Cities incorporate herein the "Reasons For Granting Writ" contained in the City of Los Angeles' Petition for Writ of Certiorari. Briefly, the *Alameda Books* decision is inconsistent with prior decisions of this Court and with decisions of five Circuit Courts of Appeal. If allowed to stand, the decision will significantly hinder the ability of local governments to effectively regulate adult businesses.

SUMMARY OF ARGUMENT

The purpose of the First Amendment is to protect free expression and promote the dissemination of thoughts and ideas. There is no danger that the messages conveyed by adult businesses will be regulated into oblivion. Notwithstanding decades of judicial decisions that have supported local governments' efforts to regulate harmful secondary effects, the adult entertainment industry continues to thrive and expand. Moreover, the Internet has added a new dimension to the dissemination of adult-oriented speech. Adult-oriented speech is not an endangered form of expression.

The *Alameda Books* decision requires that a city present particularized evidence that a particular combination of adult businesses actually produce the secondary effects that a City seeks to ameliorate. This requirement significantly endangers the ability of local governments to reasonably experiment with regulatory solutions to admittedly serious problems. Cities simply do not have the statistical tools or the financial resources to develop evidence of sufficient specificity to meet the burden established in *Alameda Books* for every regulatory aspect of their adult business ordinances.

Neither the decisions of this Court, nor the decisions of other Circuit Courts of Appeal, have imposed such an insurmountable burden. In fact, these decisions have consistently held that local governments may rely on their own studies, or studies of other jurisdictions, to document the harmful secondary effects of adult businesses, so long as they believe that the evidence in the studies is relevant to the problems they address. That standard has

resulted in a reasonable balance between regulation of adult-oriented speech and free expression that would be destroyed by *Alameda Books*.

REASONS WHY CERTIORARI SHOULD BE GRANTED

A. The Evidentiary Standard Established By The Ninth Circuit For Land Use Studies Would Impose Impossible Burdens On Attempts By Local Jurisdictions To Address The Harmful Secondary Effects Caused By Adult Businesses.

It is conceded that the 1977 Study did not include specific evidence that adult bookstores/arcades located in the same building produce specific harmful secondary effects. However, the 1977 Study did document (as have numerous other studies) that the concentration of adult entertainment businesses results in increased crime, decreased property values, and generally causes blight and other negative impacts in the neighborhoods in which they are located. Based on this general evidence of harmful secondary effects, the fact that adult bookstores/arcades constituted 25% of the adult establishments in areas identified as heavily impacted by harmful secondary effects, and the *Hart* decision, the City reasonably concluded that the combination of two adult businesses in the same building likely contributes to similar blighting conditions and adverse secondary effects.

Given this reasonable conclusion, the City reasonably experimented with a solution that it believed would be successful. It required that different types of adult uses, including adult bookstores and adult video arcades, not

be combined under a single roof. This requirement is a logical extension of the common requirement that adult uses under different ownership be geographically dispersed. Moreover, both requirements are based on the reasonable conclusion that a concentration of adult uses, be they of the same or different ownership, exacerbate the inevitable harmful secondary effects.

If, as *Alameda Books* suggests, general evidence of the harmful effects of a concentration of adult uses is insufficient to justify a regulation requiring dispersal, local jurisdictions will have an exceedingly difficult time enforcing their current adult business regulations or adopting new ones.

The ever-lengthening list of variations of adult businesses attests to the breadth and variability of this industry. New variations constantly appear in attempts to expand markets and circumvent existing regulations. The complexity of the ordinances regulating these uses has necessarily grown in an attempt to keep pace with the ever-changing adult business industry and evolving judicial standards. Current adult business ordinances often measure in excess of 30 pages and contain dozens of regulatory provisions.

The Los Angeles ordinance is a typical example. The ordinance defines eight types of adult businesses: adult arcades, adult bookstores, adult cabarets, adult motels, adult motion picture theaters, adult theaters, and sexual encounter establishments. See Petition for Writ of Certiorari filed by Petitioner, City of Los Angeles, Appendix pp. 62-65. *Alameda Books* suggests that the City must identify harmful secondary effects resulting from each

type of business as an individual business entity, before that business may be regulated. Even if local jurisdictions had the funds to do so, available statistical and evidentiary tools are not refined or sophisticated enough to produce that level of evidence in a cost-effective manner. Moreover, crime statistics and diminution of property values are difficult to correlate to particular business practices. Land use studies to date are focused on correlating harmful secondary effects of concentrations of adult businesses over large geographic areas and not focused on specific harmful effects caused by individual adult businesses or operating components of that adult business.

The Los Angeles ordinance prohibits adult businesses from locating within 500 feet of sensitive uses such as religious institutions, schools and public parks. Based on the logic employed by the Ninth Circuit in *Alameda Books*, Los Angeles would need to show that each type of business, or each business component, individually, would produce harmful secondary effects before they could be prohibited from locating next to such sensitive uses. Presumably, regulations concerning hours of operation, dress standards for dancers, etc., would also be required to meet the same stringent evidential standard requiring specific documentation of harmful secondary effects before a city can impose them. New forms of adult businesses would be impossible to regulate until the jurisdiction had exposed itself to sufficient harmful effects for a sufficient length of time to amass sufficient evidence detectable by statistical methods to meet the standard set forth in *Alameda Books*.

The California Cities believe that the following hypothetical aptly demonstrates the difficult and unworkable burdens *Alameda Books* will impose on local jurisdictions.[4] Imagine that entrepreneurs have recently requested permits to operate adult use car washes, either as special events or permanent car wash uses. The car washes typically include an "adult carwash" performed by topless or nude valets, a dunk tank of valets in which the dunk contestants are clad in skimpy T-shirts, and the sale of adult merchandise on the premises of the car wash. The advertising for the new car wash also touts the permissive use of video and still cameras, presumably to capture the adult use activities. The introduction of adult business activities in an otherwise conventional car wash is novel enough not to be addressed in existing secondary effect studies or adult business ordinances. Thus, should a city wish to address the attendant impacts of such an event, under the Ninth Circuit's newly-adopted standards, a city must not only study the obvious impacts such a use will have on surrounding residences and businesses, the study must also include an analysis of each operating component – the car wash, dunk tank, sale of merchandise and video/still photography – in order to permit reasonable regulations of this use. Since this is a novel adult business use and no other jurisdiction has an operating adult car wash, the Ninth Circuit's evidentiary standard for regulating this use becomes unworkable and unnecessarily harsh.

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[4] While this narrative is termed a "hypothetical," the California Cities note that it is based on actual inquiries made by car wash operators in southern California for a determination of use.

Putting aside the practical difficulties in finding and documenting the adverse impacts of each component of this use, any city faced with imposing regulations on this car wash will also be considerably constrained by the costs attendant in conducting and/or commissioning the numerous secondary effects studies now required by the Ninth Circuit's *Alameda Books* decision. At a time when land use study costs can range anywhere from $3,000, for the most elementary study, to over $100,000 for studies with complicated statistical analyses, even the richest cities will be hard pressed to pay for secondary effect studies needed to document every manifestation or operating component of an adult business use. When the administrative burdens imposed by the Ninth Circuit's evidentiary standard for land use studies are coupled with the fiscal impacts of those burdens, *Alameda Books* spells the death knell of new regulatory approaches that are responsive to the impacts produced by novel adult businesses.

B. This Court Has Not Required That Adult Business Regulations Be Supported By Particularized Evidence In The Legislative Record.

This Court has repeatedly rejected the approach taken in *Alameda Books*. Previous decisions have accorded local governments considerable discretion in justifying their attempts to ameliorate harmful secondary effects, by routinely deferring to the reasonableness of legislative judgements in crafting regulatory solutions to the serious problems posed by adult uses.

In *City of Renton v. Time Playtime Theaters*, 475 U.S. 41 (1986) (*Renton*), this Court considered a dispersal ordinance enacted by the City of Renton, Washington. The Ninth Circuit had struck down Renton's zoning ordinance because it was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton." *Renton* at 50. The Supreme Court upheld the Renton ordinance, holding that requiring evidence of particular problems in Renton was an "unnecessarily rigid burden of proof." The Court noted:

> "The first amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as *whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*" (Emphasis added.) *Renton* at 51-52.

Moreover, the Court stressed that cities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." (Emphasis added.) *Renton* at 52; *citing, Young v. American Mini Theaters*, 427 U.S. 50, 71 (1976).

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (*FW/PBS*), the City of Dallas adopted a comprehensive ordinance regulating adult businesses, including adult motels. The term "adult motel" was defined to include a motel offering a room for rent for a period of less than ten hours. Petitioners challenged the ordinance, in part, on grounds that the City of Dallas did not have a sufficient factual basis upon which to conclude that the rental of motel rooms for fewer than ten hours produced adverse

impacts. The Dallas City Council had before it only the City of Los Angeles' 1977 Study that considered generally the effects of adult motels on surrounding neighborhoods. *FW/PBS* at 236. The Supreme Court upheld the provision:

> "The court of appeals thought it *reasonable to believe* that shorter rental time periods *indicate* that the motels foster prostitution and that this type of criminal activity is what the ordinance seeks to suppress. [Citation omitted] *Therefore, no more extensive studies were required than those already available.* We agree with the court of appeals that the *reasonableness of the legislative judgment*, combined with the Los Angeles study, is adequate to support the City's determination that motels permitting room rentals for fewer than 10 hours should be included within the licensing scheme." (Emphasis added.) *FW/PBS* at 236.

Likewise, in *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991) (*Barnes*), this Court upheld an Indiana statute prohibiting public nudity as applied to nude erotic dancing, notwithstanding that the legislative record was devoid of any evidence regarding the legislature's intent or the negative secondary effects of such activity. No single opinion commanded the votes of a majority of the court. The opinion of Chief Justice Rehnquist, writing for Justices O'Connor and Kennedy, noted that "[i]t is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislature had in mind." *Barnes* at 567-568. The opinion nevertheless concluded that "the statute's purpose of protecting societal order and morality is clear," and that

such a purpose furthered a substantial governmental interest. *Barnes* at 568.

Justice Souter, who wrote separately in *Barnes* to uphold the statute, noted:[5]

> "In *Renton v. Playtime Theatres, Inc.* [citations omitted], we upheld a city's zoning ordinance designed to prevent the occurrence of harmful secondary effects, including crime associated with adult entertainment, by protecting approximately 95% of the city's area from the placement of motion picture theaters emphasizing ' "matter depicting, describing or relating to 'specified sexual activities' . . . for observation by patrons therein." ' [citations omitted] Of particular importance to the present inquiry, we held that the City of Renton was not compelled to justify its restrictions by studies specifically relating to the problems that would be caused by adult theaters in that city. Rather, 'Renton was entitled to rely on the experiences of Seattle and other cities' [citations omitted], which demonstrated the harmful secondary effects correlated with the presence 'of even one [adult] theater in a given neighborhood.' [citations omitted]
>
> The type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton, American Mini Theatres,* and *LaRue. It therefore is no leap to say that live nude dancing of the sort at issue here is likely to*

[5] The Fifth, Sixth and Eleventh Circuits have concluded that the reasoning of Justice Souter's opinion is controlling as it was the narrowest of the opinions in the *Barnes* majority. *J & B Entertainment, Inc. v. City of Jackson,* 152 F.3d 362, 370 (5th Cir. 1998).

> *produce the same pernicious secondary effects as the adult films displaying 'specified anatomical areas' at issue in Renton. . . . "* (Emphasis added.) *Barnes* at 583-584.[6]

In *City of Erie v. Pap's A. M.,* 529 U.S. 277 (2000) (*Erie*), the most recent decision in which this Court examined the evidentiary standard necessary to support adult business regulations, this Court reaffirmed the *Barnes* standard in upholding a ban on nude dancing. The plurality concluded, as did Justice Souter in *Barnes,* that general evidence of the harmful secondary effects of adult businesses was sufficient to justify regulation of adult activities of a similar character:

> " . . . [I]n terms of demonstrating that such secondary effects pose a threat, the city need not 'conduct new studies that produce evidence independent of that already generated by other cities' that demonstrate the problem of secondary effects, 'so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.' " [Citation omitted]
>
> "Because the nude dancing at [Pap's] Kandyland is of the same character as the adult entertainment at issue in *Renton, Young v. American Mini Theaters, Inc.,* [citations omitted], and *California v. LaRue* [citations omitted], it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects, and Erie could reasonably rely on

[6] The California Cities recognize that Justice Souter later disclaimed his concurrence in *Barnes* in his concurring and dissenting opinion in *Erie*. See *Erie* at 294.

> the evidentiary foundation set forth in *Renton* and *American Mini Theaters* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. . . . Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdiction is relevant to the problem it is addressing." (Emphasis added.) *Erie* at 283.

The plurality explicitly rejected Justice Souter's suggestion that the City of Erie be required "to develop a specific evidentiary record supporting its ordinance." *Erie* at 284.

By requiring that Los Angeles produce studies that specifically identify harmful secondary effects resulting from a specific adult business or combination of adult businesses, the Ninth Circuit has imposed a burden similar to that suggested by Justice Souter, but rejected by this Court in *Erie*. The California Cities respectfully request that the *Alameda Books* decision also be rejected for the reasons set forth in the *Renton, Barnes* and *Erie* decisions of this Court.

C. CONCLUSION

The widespread application of the *Alameda Books* standard would spell the death knell of effective regulation of adult-oriented businesses. Local jurisdictions simply do not have the financial ability or the statistical tools to produce the particularized evidence necessary to meet the *Alameda Books* standard for each manifestation or

combination of adult use activities within their jurisdiction.

This Court has consistently articulated a much more reasonable standard. This standard provides that cities may rely on general evidence of the harmful secondary effects to justify reasonable regulations. The application of that standard has resulted in a reasonable balance between the need to regulate businesses that produce harmful secondary impacts and the protection of constitutionally-protected speech. In the 20 years that the *Renton, Barnes* and *Erie* standard has been applied, adult businesses have not been regulated into oblivion. To the contrary, they have flourished in ever-changing forms. At the same time, communities across the United States have, for the most part, been largely successful in ameliorating the pernicious secondary effects caused by those businesses.

The California Cities respectfully request that this Court reaffirm the *Renton, Barnes* and *Erie* standard to enable the California Cities to continue to adopt and enforce effective regulatory mechanisms to meet the

challenges of ameliorating the harmful secondary effects of adult businesses.

Dated: January 5, 2001

Respectfully Submitted,

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APPENDIX 1

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v.

ALAMEDA BOOKS, INC., et al,

In Support of City of Los Angeles' Petition for Writ of Certiorari to the Supreme Court of the United States

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